Fred's Inc. *and* Southern Regional Joint Board, UNITE, AFL–CIO, CLC. Case 26–CA–21528

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed by the Union on January 16 and June 1, 2004, respectively, the General Counsel issued the complaint on June 1, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 26–RC–8316. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On June 21, 2004, the General Counsel filed a Motion for Summary Judgment. On June 23, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 13, 2004, the Respondent filed a cross-motion for summary judgment and opposition to the General Counsel's Motion for Summary Judgment. On July 30, 2004, the Union filed an answer to the Employer's cross -motion for summary judgment and reply to Employer's opposition. On August 3, 2004, the General Counsel filed a response to the Respondent's opposition and cross-motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent denies that it has refused to recognize and bargain with the Union, but avers, as affirmative defenses, that the certification of the Union was improper, that the election was not conducted properly, and that the results of the election are invalid.

In its cross-motion for summary judgment and opposition to the General Counsel's motion, the Respondent argues that it has engaged in bargaining with representatives of the Union since March 2004, and has reached an agreement which provides that the Respondent recognizes the Union as the collective-bargaining representative for the unit employees. The Respondent contends that the complaint allegations that it has failed to recognize and bargain with the Union are untrue, and that it is entitled to summary judgment and to have the complaint dismissed in its entirety. We disagree.

The Board has consistently found that where an employer continues to challenge the validity of a union's certification, it is effectively refusing to bargain with the union, even where it has stated that it is willing to engage in negotiations.[1] Thus, an employer "may negotiate with, or challenge the certification of, the Union; it may not do both at once." *Terrace Gardens Plaza. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). In *Terrace Gardens*, the court further noted that when an "employer reserves the right (i.e., implicitly threatens) to challenge the union's certification in the court of appeals, it is trying to avoid the necessity to choose between the alternatives it has under the statute. As we explained above, the employer must either bargain unconditionally, or, if it wants to contest the union's right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding." Id. at 226.

As noted above, the Respondent's answer to the complaint denies that the Respondent has failed to recognize and bargain with the Union, but "avers that the election was not conducted properly and that the results of the election are invalid . . . [and] avers that the certification was not proper." In addition, the Respondent has clearly indicated in its communications with the General Counsel and the Union its intention to test the Union's certification.[2] Further, although

[1] See, e.g., *Overland Transportation System,* 323 NLRB 491 (1997), enfd. 187 F.3d 637 (6th Cir. 1999) (Board found refusal-to-bargain violation despite letter to union that employer's attorney was available to meet for negotiations on behalf of one respondent; statement that he was not authorized to negotiate for another respondent found to be a single employer was indication that the union's certification was at issue); *Terrace Gardens Plaza,* 315 NLRB 749 (1994), enfd. 91 F.3d 222 (D.C. Cir. 1996) (Board found refusal-to-bargain violation despite employer's contention that its letter to union offering to meet and bargain merely reserved its right to seek judicial review of the union's certification); *Biewer Wisconsin Sawmill, Inc.*, 306 NLRB 732 (1992) (despite respondent's answer denying that it refused to bargain with union, its admission that it intended to test the union's certification was sufficient to establish a violation).

[2] The General Counsel attached to its Motion for Summary Judgment letters dated March 15, 2004, from the Respondent to the Regional Director and the Union. The letter to the Region states that the Respondent "has decided to test UNITE's certification" in the representation case by "technically refusing to bargain with UNITE." The letter to the Union confirms its intention to test the Union's certification, stating: "Even though we have initiated the process of testing certification, we still intend to meet with you . . . to see if we can resolve any differences between the parties and reach an agreement satisfactory to both sides. You have indicated that it is UNITE's position that if we continue to meet with you and the others, UNITE will take the position that we will have waived our right to test certification, and even though we disagree with your position, we understand it." In addition, the General Counsel has attached a letter dated March 26, 2004, in which the Respondent informed the Union that "even though we have agreed to meet with you and your committee on Tuesday, Fred's still plans to move forward with our plans to test UNITE's certification by techni-

it claims that it has not violated the Act because it has met and bargained with the Union, the Respondent has never disavowed its intention to test the Union's certification. Accordingly, we find that the Respondent has never unconditionally recognized the Union or engaged in good-faith bargaining.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Memphis, Tennessee, has been engaged in warehousing and the wholesale distribution of consumer goods. During the 12-month period ending May 31, 2004, the Respondent, in conducting its business operations described above, sold and shipped from its Memphis facility goods valued in excess of $50,000 directly to points located outside the State of Tennessee, and purchased and received at its Memphis facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Southern Regional Joint Board, UNITE, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 29, 2002, the Union was certified on November 20, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All warehouse and maintenance employees including department heads, warehouse clerical employees, spotters who do not drive, transportation clerks, and employees employed in the following named departments: POS maintenance, warehouse maintenance, facility maintenance, picking, receiving and stocking, loading, shipping, and inventory control employed by Respondent.
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> EXCLUDED: All other employees (including spotters who drive, drivers, and employees in the following departments: accounting, advertising, engineering, finance, human resources, information systems, insurance, legal, merchandising, payroll, pharmacy, printing, purchasing and real estate), guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since November 24, 2003, the Union has requested the Respondent to bargain, and, since November 25, 2003, the Respondent has refused to do so. We find that the Respondent has thereby unlawfully failed and refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after November 25, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Fred's, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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cally refusing bargain." The Respondent does not dispute the authenticity of these letters.

[3] The Respondent's cross-motion for summary judgment is therefore denied.

(a) Refusing to bargain with Southern Regional Joint Board, UNITE, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> INCLUDED: All warehouse and maintenance employees including department heads, warehouse clerical employees, spotters who do not drive, transportation clerks, and employees employed in the following named departments: POS maintenance, warehouse maintenance, facility maintenance, picking, receiving and stocking, loading, shipping, and inventory control employed by Respondent.
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> EXCLUDED: All other employees (including spotters who drive, drivers, and employees in the following departments: accounting, advertising, engineering, finance, human resources, information systems, insurance, legal, merchandising, payroll, pharmacy, printing, purchasing and real estate), guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 26 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Southern Regional Joint Board, UNITE, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> INCLUDED: All warehouse and maintenance employees including department heads, warehouse clerical employees, spotters who do not drive, transportation clerks, and employees employed in the following named departments: POS maintenance, warehouse maintenance, facility maintenance, picking, receiving and stocking, loading, shipping, and inventory control employed by us.
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> EXCLUDED: All other employees (including spotters who drive, drivers, and employees in the following departments: accounting, advertising, engineering, finance, human resources, information systems, insurance, legal, merchandising, payroll, pharmacy, printing, purchasing and real estate), guards, and supervisors as defined in the Act.

FRED'S, INC.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."